Construction and General Laborers' Local 118, Laborers' International Union of North America, AFL–CIO *and* D. H. Johnson Company and International Union of Operating Engineers, Local 150, AFL–CIO

International Union of Operating Engineers, Local 150, AFL–CIO *and* D. H. Johnson Company and Construction and General Laborers' Local 118, Laborers' International Union of North America, AFL–CIO. Cases 13–CD–303 and 13–CD–304

July 22, 1982

DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN VAN DE WATER AND MEMBERS FANNING AND HUNTER

This is a proceeding under Section 10(k) of the National Labor Relations Act, as amended, following charges filed by D. H. Johnson Company, herein called the Employer. In Case 13–CD–303, the Employer alleged that Construction and General Laborers' Local 118, Laborers' International Union of North America, AFL–CIO, herein called the Laborers, had violated Section 8(b)(4)(D) of the Act by threatening to picket with an object of forcing the Employer to refrain from assigning certain work to employees represented by International Union of Operating Engineers, Local 150, AFL–CIO, herein called the Engineers, in a manner inconsistent with its current assignment to the Laborers. In Case 13–CD–304, the Employer alleged that the Engineers had violated Section 8(b)(4)(D) of the Act by picketing with an object of requiring the Employer to assign certain work to employees represented by the Engineers rather than to employees represented by the Laborers.

Pursuant to notice, a hearing was held on the consolidated cases before Hearing Officer Ramon Martinez, Jr., on October 1 and 9, 1981. All parties appeared and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to adduce evidence bearing on the issues. Thereafter, briefs were filed by the Employer, the Engineers, and the Laborers.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reviewed the Hearing Officer's rulings made at the hearing and finds that they are free from prejudicial error. They are hereby affirmed.

Upon the entire record in this proceeding, the Board makes the following findings:

I. THE BUSINESS OF THE EMPLOYER

The parties stipulated, and we find, that the Employer, a Delaware corporation, is engaged in the business of brick masonry as a construction subcontractor. Its principal place of business is in DuPage County, Illinois. During the last calendar or fiscal year, the Employer had gross revenues in excess of $500,000 and purchased goods and materials from outside the State of Illinois which it received at its worksites within the State of Illinois, having a value in excess of $50,000. The parties also stipulated, and we find, that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATIONS INVOLVED

The parties stipulated, and we find, that the Engineers and the Laborers are both labor organizations within the meaning of Section 2(5) of the Act.

III. THE DISPUTE

A. *Background and Facts of the Dispute*

The Employer is a construction subcontractor for an apartment building project located in Mount Prospect, Illinois, at which it employs both laborers and bricklayers. In general, the bricklayers are responsible for laying the masonry material (brick, block, stone, and wire) on the wall being constructed; the laborers are responsible for mixing the mortar prior to its transportation to the bricklayers, and for assisting the bricklayers by shoveling mortar from the mortar tub to mortarboards for the bricklayers' use in laying the block or brick. The laborers also assemble scaffolding, and perform cleanup work or any miscellaneous tasks. Forklifts are used on the Employer's construction projects to lift bundles of bricks or the mortar tubs to the bricklayers' work locations, be they on the ground or on the scaffolding. The forklift also is used in the actual erection of the scaffolding.

Pursuant to its agreement with the Construction and General Laborers' District Council of Chicago and Vicinity and consistent with its desires, the Employer assigned the operation of the forklift on the Mount Prospect project to employees represented by the Laborers by letter dated August 17, 1981.[1] The evidence presented at the hearing established that the Engineers threatened to picket the jobsite unless forklift work being performed by employees represented by the Laborers was reassigned to employees represented by the Engineers;

[1] All dates are in 1981 unless indicated otherwise.

the Engineers thereafter began picketing on August 27, and the picketing lasted for approximately 2 weeks.[2] In a letter dated September 2, the Laborers informed the Employer that it would engage in picketing if the Employer reassigned the forklift work in any manner inconsistent with the current assignment to employees represented by the Laborers. On September 2, the Employer filed 8(b)(4)(D) charges against both the Engineers and the Laborers.

On September 14, the Engineers requested a hearing before the Joint Conference Board, herein called JCB, which is described below, regarding the Employer's assignment of the disputed forklift operation to employees represented by the Laborers. The Employer refused to participate in the scheduled hearing, and sent a mailgram to the secretary of the JCB advising that "[the Employer] is not stipulated to the JCB for settlement of jurisdictional disputes and is not bound to any of its decisions."[3] The JCB awarded the work to employees represented by the Engineers.[4]

With respect to whether there is, in fact, an agreed-upon method to resolve this dispute, the record indicates that the Employer is signatory to a 1965 Memorandum of Agreement with the Engineers, pursuant to which both parties agreed to adopt the then-existing collective-bargaining agreement between the Engineers and the Building Association of Chicago (BAC). The Memorandum of Agreement also provides for the adoption of any agreement entered into between the Engineers and the BAC unless notice of termination or amendment is provided in the manner specified. No such notice has ever been given.

BAC is an affiliate of the Building Construction Employers' Association of Chicago (CEA). In an agreement known as the "Standard Agreement," the CEA and the Chicago and Cook County Building and Construction Trades' Council (BCTC) formed the JCB. The declared purpose of the JCB is to act as mediator in disputes arising at jobsites in Cook County, Illinois, where the Mount Prospect project is located, concerning trade agreements between unions and associations affiliated with the CEA and the BCTC.

The Engineers alleges that the Laborers is also subject to the terms of the Standard Agreement as a result of its affiliation with the Chicago Building Trades Council (CBTC). The Engineers is a member of the CBTC, while the Laborers is an affiliate of the Construction and General Laborers' District Council of Chicago and Vicinity, which itself is a member of the CBTC. CBTC's bylaws provide that all jurisdictional work disputes between affiliates of the CBTC shall be resolved in accordance with the Standard Agreement. Additionally, the Engineers alleges in its brief to the Board that both the Engineers and the Laborers have representatives sitting on the JCB.[5]

There is also in effect, however, a collective-bargaining agreement between the Laborers' International Union of North America and the Mason Contractors Association of America (MCAA), of which the Employer is an admitted member. That agreement provides that all work jurisdiction disputes are to be referred to the International Union and the MCAA for resolution. In addition, this agreement provides specifically that the provision for jurisdictional work disputes resolution is exclusive and that it supercedes any other procedure outlined in any agreement between a member of the MCAA and any local union.

B. *The Work in Dispute*

The work in dispute involves the operation of a forklift which transports and hoists masonry materials and erects scaffolding in aid of bricklayers employed by the Employer at the apartment construction project at 900 East Centennial Drive in Mount Prospect, Illinois.

C. *Contentions of the Parties*

The Employer contends that the dispute is properly before the Board because there does not exist any method for the voluntary adjustment of the instant jurisdictional dispute to which all necessary parties are bound. It argues that it is not a member of the BAC or the CEA, and therefore claims that it is not bound to the JCB by any employer association membership or affiliation. The Employer claims membership only in the MCAA and the Mason Contractors Association of DuPage County, neither of which is a member of the JCB. In addi-

[2] The Engineers makes no attempt to refute this evidence in the record correlating the picketing to the job assignment. In particular, Lloyd Anderson, a field superintendent for the Employer, testified that the Engineers' business representative, Bill Rucker, orally demanded that the forklift operation be assigned to a member of the Engineers. When informed that the work had been assigned to an employer represented by the Laborers, he allegedly stated, "Well, we'll, we'll see about this." Soon thereafter, but after a lapse of more than 48 hours, employees represented by the Engineers commenced picketing on August 27.

[3] According to the record, representatives of the Laborers and the Engineers appeared at the October 7 hearing conducted by the JCB. Joseph DeRose, business manager for the Laborers, allegedly admitted at that hearing that the Laborers was bound to the JCB for resolution of the jurisdictional work dispute. In its brief to the Board, however, the Laborers contends that its representatives objected specifically to the jurisdiction over the matter at that hearing, and that the Laborers now has no intention of complying with the JCB's determination.

[4] The JCB decision issued before the hearing closed in this case.

[5] The purported Laborers' representative sitting on the JCB in actuality is the secretary-treasurer of the Construction and General Laborers' District Council of Chicago and Vicinity.

tion, the Employer claims that it is not bound by the Memorandum of Agreement signed with the Engineers in 1965, as no further agreements have been entered into between the two parties. It further argues that its assignment of the disputed work was proper in light of certain factors usually considered by the Board in these matters. The Employer contends that the disputed work should be assigned to the employees represented by the Laborers, relying on the following factors: employer preference, economy and efficiency of operation, safety, relative skills, and employer past practice.

The Engineers contends that the Board is without jurisdiction to detemine the merits of the dispute under Section 10(k) of the Act because the parties have agreed upon a method for the voluntary adjustment of the dispute, for the reasons expressed more fully, *supra*. Alternatively, in the event the dispute is properly before the Board, the Engineers urges that the work be assigned to employees represented by it on the basis of collective-bargaining agreements, employer and area practice, awards of the JCB, relative skills, efficiency and economy of operation, and the alleged job impact of an award to employees represented by the Laborers.

The Laborers contends that there is no agreed-upon method for the voluntary adjustment of the instant dispute and that the Employer's assignment of the work to employees represented by the Laborers was proper and in accord with the economy and efficiency of operation and relative skills factors. While the Laborers contends that it does not consider itself to be bound by the JCB, it offers no rebuttal to the Engineers' allegation that the Laborers is bound by means of its affiliation with the CBTC.

D. *Applicability of the Statute*

Before the Board may proceed with a determination of the dispute pursuant to Section 10(k) of the Act, it must be satisfied that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated and that the parties have not agreed upon a method for the voluntary adjustment of the dispute.

1. It is undisputed that the Engineers picketed the Centennial project site, and we find that such picketing was to protest the Employer's assignment of the disputed work to employees represented by the Laborers. Accordingly, we find that reasonable cause exists to believe that the Engineers violated Section 8(b)(4)(D) of the Act. Additionally, the Laborers does not dispute that it threatened to picket the Centennial project if the Employer were to reassign the disputed work to the employees represented by any other union. Accordingly, we find that reasonable cause exists to believe that both the Laborers and the Engineers violated Section 8(b)(4)(D) of the Act.

2. Before the Board will defer to an agreed-upon method for settlement of a dispute, the agreement must bind all the parties, including the Employer.[6] Assuming *arguendo* that both Unions are bound to the JCB by virtue of their membership in or affiliation with the CBTC, and that the Employer generally is subject to the terms of the Standard Agreement in jurisdictional work disputes concerning the Engineers by virtue of its 1965 Memorandum of Agreement, nevertheless, it is undisputed that the International Agreement between the MCAA and the Laborers' International Union of North America contains a clause obligating the Employer to submit jurisdictional disputes to the International Office of the Union for resolution and that such procedure is exclusive and supercedes any other procedure delineated in an agreement between a member of the MCAA and any local union. Thus, assuming *arguendo* that the Laborers, the Engineers, and the Employer all may be found to have committed themselves to the use of the JCB for the resolution of jurisdictional work disputes, the existence of the equally binding, but conflicting, work dispute provision in the MCAA-Laborers' International Agreement precludes a finding of a determinative, agreed-upon method of dispute resolution in the instant case.[7]

On the basis of the entire record, we conclude that there is reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred and that there exists no agreed-upon method for the voluntary adjustment of the dispute within the meaning of Section 10(k) of the Act. Accordingly, we find that this dispute is properly before the Board for determination.

E. *Merits of the Dispute*

Section 10(k) of the Act requires the Board to make an affirmative award of disputed work after giving due consideration to various factors.[8] The Board has held that its determination in a jurisdictional dispute is an act of judgment based on com-

[6] *N.L.R.B.* v. *Plasterers Local Union No. 79, Operative Plasterers' and Cement Masons' International Association, AFL-CIO [Texas State Tile & Terrazo Co., et al.]*, 404 U.S. 116 (1971); *International Union of Operating Engineers, Local Nos. 77, 77-A, 77-B, 77-C, 77-D, AFL-CIO (Bricklaying, Inc.)*, 252 NLRB 106, 107 (1980).

[7] See, e.g., *Laborers' District Council of Washington, D.C. and Vicinity, affiliated with Laborers' International Union of North America, AFL-CIO (Western Caissons, Inc.)*, 240 NLRB 1160 (1979).

[8] *N.L.R.B.* v. *Radio & Television Broadcast Engineers Union, Local 1212, International Brotherhood of Electrical Workers, AFL-CIO [Columbia Broadcasting System]*, 364 U.S. 573 (1961).

monsense and experience reached by balancing those factors involved in a particular case.[9]

The following factors are relevant in making the determination of the dispute before us:

1. Collective-bargaining agreements

The Employer has no collective-bargaining agreement with the Laborers. Nevertheless, the Laborers' International Union of North America's agreement with the MCAA was modified on June 1, 1981,[10] to include "forklifts for brick masons" within the work jurisdiction of the members of the Laborers' International Union of North America. Likewise, the agreement entered into between the Mid-American Regional Bargaining Association (as bargaining agent for the BAC) and the Engineers, the terms of which are adopted in the Employer's 1965 Memorandum of Agreement with the Engineers, provides wage rates for brick forklift operation. Because there are conflicting collective-bargaining agreements, both of which indicate that forklift operation is within the work jurisdiction of the respective unions, we find that this factor does not favor an award to employees represented by either union.

2. Company past practice

The Employer has performed numerous masonry subcontract jobs in the DuPage and Cook County, Illinois, areas. Although the forklift was not used until August 1981 on the Centennial project, the Employer has used forklift operators on a number of projects in the past. Record testimony reveals that only employees of the Laborers have been utilized for forklift operation on the Centennial project.

While the Engineers contends in its brief to the Board that the Employer "has continuously employed" employees which it represents for forklift operation in the past, record testimony of a company agent reveals that the Employer intermittently used employees represented by both the Laborers and the Engineers for forklift operation in prior construction projects, although the latter have obtained "probably the majority" of the assignments. The same agent testified that he had assigned the forklift work to employees represented by the Laborers whenever possible, except when pressure was applied on the Employer to make an alternative assignment or suffer work strife. Accordingly, we find that the Company's past practice is a neutral factor which does not favor an award to employees represented by either union.

3. Relative skills

The record indicates that employees represented by the Laborers require initial instruction by the foreman in order to undertake the task of forklift operation. While members of the Engineers do not require similar instruction, operation of the forklift is simple; it requires only minimal instruction, and there is no evidence showing that the Employer has been dissatisfied with the work performance of the Laborers on the jobsite. Accordingly, this factor does not favor an award to employees represented by either union.

4. Economy and efficiency of operation

The record indicates that the forklift is in operation about 3 hours a day on the Centennial project. When the forklift is not in operation, employees represented by the Laborers assist the bricklayers in the performance of their work by mixing mortar, spreading mortar on the mortarboards, cleaning up, or performing miscellaneous tasks. Record testimony conflicts, however, with regard to the willingness of employees represented by Engineers to engage in the aforementioned ancillary tasks when the Employer assigned the forklift operation to them on prior projects. At the hearing, a field superintendent for the Employer contended that employees represented by the Engineers failed to perform these necessary ancillary tasks during the substantial time when the forklift was idle on past projects. According to a witness for the Engineers, however, the operating engineers' work was not so limited. In addition, employees represented by the Engineers are employed on the basis of a guaranteed 8-hour workday; the Laborers work rules contain no such restriction. According to the record, employees represented by the Engineers must be paid for the entire day once they have commenced the job, regardless of inclement weather. Therefore, these factors in combination favor awarding the work to employees represented by the Laborers.

5. Joint Conference Board determinations

In certain prior disputes involving the operation of a forklift on other sites involving other employees, the JCB has awarded the disputed work to the Engineers over the Laborers. In addition, submission of the instant dispute to the JCB resulted in a work award for the Engineers. Nevertheless, although JCB decisions awarding the disputed work to employees represented by the Engineers may be a factor to be considered, they are not controlling, because there is no evidence in the record explicating the factors relied on by the JCB in reaching its

[9] *International Association of Machinists, Lodge No. 1743, AFL-CIO (J. A. Jones Construction Co.)*, 135 NLRB 1402 (1962).

[10] The dispute in question did not arise until August 31, 1981.

determinations which would enable us to determine the degree of deference that these determinations should be accorded.[11] Therefore, this factor does not favor an award to employees represented by either union.

6. Employer preference

The Employer has assigned the disputed work to employees represented by the Laborers and has expressed its preference that the disputed work be performed by them. Employer preference therefore favors an award to employees represented by the Laborers.

7. Job impact of the award

In its brief to the Board, the Engineers contends that an award of the disputed work in favor of the Laborers would destroy the Engineers' bargaining unit completely, but would not have a destructive effect on employees represented by the Laborers. Inasmuch as the Employer had never used the forklift previously on this project and employees represented by the Engineers had not been working for the Employer on the project, we find that the Engineers has no grounds for arguing that an award contrary to its interests would result in the complete displacement of employees it represents.

Conclusion

Upon the record as a whole, and after full consideration of all relevant factors involved, we conclude that employees who are represented by the Laborers are entitled to perform the work in dispute. In making this determination, we are awarding the work in question to the employees of D. H. Johnson Company who are represented by the Laborers, but not to that Union or its members. The present determination is limited to the particular controversy which gave rise to this proceeding.

DETERMINATION OF DISPUTE

Pursuant to Section 10(k) of the National Labor Relations Act, as amended, and upon the basis of the foregoing findings and the entire record in this proceeding, the National Labor Relations Board makes the following Determination of Dispute:

1. Employees of D. H. Johnson Company who are represented by Construction and General Laborers' Local 118, Laborers' International Union of North America, AFL-CIO, are entitled to perform the work of operating the forklift at the 900 East Centennial apartment construction project in Mount Prospect, Illinois.

2. International Union of Operating Engineers, Local 150, AFL-CIO, is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force or require D. H. Johnson Company to assign the disputed work to employees represented by that labor organization.

3. Within 10 days from the date of this Decision and Determination of Dispute, International Union of Operating Engineers, Local 150, AFL-CIO, shall notify the Regional Director for Region 13, in writing, whether or not it will refrain from forcing or requiring the Employer, by means proscribed by Section 8(b)(4)(D) of the Act, to assign the disputed work in a manner inconsistent with the above determination.

MEMBER FANNING, dissenting:

Contrary to my colleagues, I would not determine the dispute herein. I find that all parties are bound to abide by the work award of the Joint Conference Board (JCB). Accordingly, as there exists an agreed-upon method for the voluntary settlement of this jurisdictional dispute, the notice of hearing should be quashed.

The facts and the contentions of the parties regarding the agreed-upon method of settlement are fully set forth by my colleagues. Briefly, the Engineers contends that all parties have obligated themselves to abide by the awards of the JCB. Contrarily, the Employer and the Laborers assert that they are not bound to the decisions of the JCB. They argue that, by virtue of becoming obligated to the dispute resolution procedures of the collective-bargaining agreement between the Laborers International and the Masonry Contractors Association of America (MCAA), their commitment to be bound by decisions of the JCB has been superceded and extinguished.

First, assuming—as do my colleagues—that all parties herein have committed themselves to the use of JCB for the resolution of jurisdictional work disputes, I would not find that the existence of a second "equally binding yet conflicting" work dispute provision defeats the viability of the first obligation. Rather, so long as *all* parties are bound by *one* of two dispute settlement procedures, there exists a binding agreed-upon method of settlement. Under these circumstances, the existence of the other settlement procedure becomes totally irrelevant.

Second, assumptions aside, I find all parties herein are, in fact, bound by the awards of the JCB. I reject the argument of the Employer and the Laborers that they are now obligated only to the dispute resolution procedures of the Laborers-MCAA contract. Neither of these parties has ever

[11] *International Brotherhood of Boilermakers, Iron Ship Builders, Forgers and Helpers, Local Union No. 72, AFL-CIO*, 247 NLRB 73, 75 (1980).

given proper notice so as to withdraw from and terminate their respective commitments to honor decisions of the JCB. Absent such notice, I would not find that the work dispute provision of the Laborers-MCAA agreement, merely by its terms, has ended the obligation of these parties to abide by the awards of the JCB. If that effect is given to the work dispute provision of the Laborers-MCAA agreement, it would permit and encourage parties to switch and/or abandon their private settlement procedures whenever they deemed it advantageous to do so.[12] In my judgment, the decision of my colleagues permits these parties to do just that. That is, finding it to their advantage to avoid their commitment to the awards of the JCB, the Employer and Laborers seek to rely on another work dispute provision to justify their actions and gain the Board's sanction of the Employer's work assignment.

Congressional policy clearly is to encourage the voluntary adjustment of jurisdictional disputes. Accordingly, when parties, as here, have bound themselves to an agreed-upon method of settlement, they should be required to abide by their commitments and honor the decisions arrived at thereby. Thus, I would quash the notice of hearing in this case.[13]

[12] See generally my dissent in *Laborers' District Council of Washington, D.C. and Vicinity, affiliated with Laborers International Union of North America, AFL-CIO (Western Caissons, Inc.)*, 240 NLRB 1161 (1979).

[13] See generally my dissents in *Construction and General Laborers, Local Union No. 449, Connecticut Laborers District Council, Laborers International Union of North America, AFL-CIO (Modern Accoustics, Inc.)*, 260 NLRB 883 (1982), and *Millwrights Local Union No. 1862 (Jelco, Inc.)*, 184 NLRB 547, 549 (1970).